

BEFORE THE
DEPARTMENT OF CORPORATIONS
STATE OF CALIFORNIA

In the Matter of the Desist and Refrain
Orders of:

NATIONWIDE ASSET SERVICES, INC.,
a.k.a. NATIONWIDE ASSET SERVICES,

and

UNIVERSAL NATIONWIDE, L.L.C.,
d.b.a. UNIVERSAL DEBT REDUCTION,

Respondents.

File No.: 38300

OAH No.: N2005120755

DECISION

The attached Proposed Decision of the Administrative Law Judge of the Office of Administrative Hearings, dated January 3, 2007, is hereby adopted by the Department of Corporations as its Decision in the above-entitled matter with the following technical and minor changes pursuant to Government Code Section 11517(c)(2)(C).

This Decision shall become effective on February 27, 2007.

IT IS SO ORDERED this 27th day of February 2007.

CALIFORNIA CORPORATIONS COMMISSIONER

Preston DuFauchard

ERRATA SHEET

(Change to Proposed Decision –Nationwide Asset Services, Inc.)

(1) Page 1, footnote 1: insert a period after "L.L.P"

(2) Page 9, ¶ 1, line 1: strike "or"

(3) Page 12, 3rd third full paragraph, line 2, strike: "subdivision (b)'s" and insert "subdivision (c)'s"

(4) Page 12, footnote 35: strike "subdivision (b)" and insert "subdivision (c)"

(5) Page 15, order (3), line 5: insert "and Global Client Solutions, LLC ⁴⁵" following "Trust"

(6) Page 15, order (3), lines 5 and 6: strike "and Global Client Solutions, LLC. ⁴⁵"

(7) Page 15: move footnote 44 from after "Commissioner" to after "trust"

(8) Page 15: line 5, after "Commissioner", strike "," and insert "."

Decision - Nationwide Asset Services, et al.

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UNIVERSAL NATIONWIDE, L.L.C.,
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Respondents.

Case No. 38300

OAH No. N2005120755

PROPOSED DECISION

The matter came on regularly for hearing¹ before Jaime René Román, Administrative Law Judge, in Sacramento, California, on September 26, 27, and 28, 2006.

Joan A. Kerst, Senior Corporations Counsel, represented the California Corporations Commissioner.

Michael Mallow, Esq., of Kirkpatrick, & Lockhart Nicholson Graham, L.L.P., represented Nationwide Asset Services, Inc., Universal Nationwide, LLC, and Universal Debt Reduction, L.L.P.

The evidentiary proceeding concluded on September 28, 2006. To accommodate transcript preparation, the filing of a costs declaration, closing arguments, and post-hearing motions, if any, a submission calendar was established. The matter was submitted on December 1, 2006.²

¹ This hearing, bifurcated on motion of Nationwide Asset Services, Inc., Universal Nationwide, LLC, and Universal Debt Reduction, L.L.P (respondents) and joined by complainant, constitutes the penalty phase of the above-captioned matter.

² Notwithstanding the established submission date of December 1, 2006; respondents tendered on December 18, 2006, a further, albeit brief, response to the December 1, 2006 Commissioner's Reply Brief. Respondents correctly observe that the undersigned is limited to the record herein. Any effort to expand the record to include matters not raised at hearing is misplaced.

FINDINGS OF FACT

1. On December 5, 2005, Acting Deputy Commissioner Alan S. Weinger, Enforcement Division, issued on behalf of the California Corporations Commissioner (the Commissioner), a Desist and Refrain Order pursuant to the California Check Sellers, Bill Payers and Proraters Law³ prohibiting Nationwide Asset Services, Inc.; Universal Nationwide, LLC; Universal Debt Reduction, LLP; and FGL Clearwater, Inc., dba American Debt Arbitration (ADA);⁴ from engaging in the business of a prorater unless and until they obtained the appropriate license or a valid exemption from the licensure requirement.⁵ On December 21, 2005, the Commissioner filed a Statement in Support of the Desist and Refrain Order, requesting ancillary relief and costs.⁶

2. Respondents do not possess a license issued by the Commissioner to act as a prorater⁷ in the State of California.

3. On April 28, 2006, following hearing from February 21 through 24, 2006, the undersigned issued a Proposed Decision that upheld the Commissioner's Desist and Refrain Order (Order) against the respondents. On August 3, 2006, effective August 4, 2006, the Commissioner adopted the undersigned's Proposed Decision.⁸ Having determined respondents' culpability, this proceeding concerns the Commissioner's prayer for administrative penalties, ancillary relief and costs. Specifically, complainant seeks:

- A. Administrative penalties.⁹
- B. Restitution and disgorgement.¹⁰
- C. Voiding of client agreements.¹¹

³ Financial Code sections 12000 and 12103.

⁴ ADA did not request a hearing pursuant to Financial Code section 12103. The Desist and Refrain Order dated December 5, 2005, has remained in full force and effect against ADA.

⁵ The Desist and Refrain Order included an additional respondent, Global Client Solutions, LLC. This respondent was dismissed following hearing at the culpability phase of this matter.

⁶ Financial Code section 12105, subdivisions (b) and (e).

⁷ Financial Code section 12200.

⁸ This Decision is incorporated herein by reference as though fully set forth. Respondents' further efforts, however advanced in this proceeding, that they are not subject to the California Check Sellers, Bill Payers and Proraters Law has been rendered moot by the Commissioner's Order of August 3, 2006.

⁹ Financial Code section 12105, subdivision (c).

¹⁰ Financial Code section 12105, subdivision (b).

¹¹ And an accounting to consumers pursuant to Financial Code section 12322.

- D. Reimbursement of the Commissioner's fees and costs.¹²
4. Respondents claim, in mitigation of any punitive imposition:
- A. Any violation of the California Check Sellers, Bill Payers and Proraters Law perpetrated by respondents was not willful.
 - B. Sufficient ambiguity surrounds the California Check Sellers, Bill Payers and Proraters Law and its application, including that no penalty should be imposed or assessed.
 - C. Respondents do not charge excessive fees.
 - D. Respondents do not enjoy excessive profits.
 - E. Respondents have ceased charging California clients, and, in the absence of a fee, are not prorating.
 - F. Respondents' business operations benefit consumers.
 - G. Respondents' business operations have not injured consumers.

5. Respondents' business operation assists indebted consumers by facilitating partial or full debt liquidation or settlement. Respondents' profits are derived, in part, from a percentage between a debtor's outstanding debt and the amount accepted by a creditor in settlement of that outstanding debt.¹³ Respondents earn other and additional fees from consumers for enrollment,¹⁴ account maintenance (administrative fee or maintenance fee) and other claimed miscellaneous fees (e.g., retainer fees, negotiation fees, electronic check fees, cancellation fees, or termination fees). Respondents' expenses included, inter alia, personnel payroll, leasehold payments, and payments tendered to independent business entities that marketed respondents' services.

6. Respondents rendered services subject to the California Check Sellers, Bill Payers and Proraters Law to no less than 3,078 California consumers. Respondents derived a profit from the services rendered to their California clients. During the course of the rendering of services, respondents did not provide regular accountings to clients. Respondents' business operations limited direct customer access to each client's established bank account at Rocky Mountain Bank & Trust. In the event of client cancellation, respondents imposed a charge and failed to immediately refund fees paid or monies on deposit.

¹² Financial Code section 12105, subdivision (e).

¹³ This is characterized by respondents as a "settlement fee."

¹⁴ This fee is known by various names: "setup" fee, enrollment fee, or counseling fee.

7. Respondents acknowledge receiving administrative fees of \$336,400.90 from California clients. In addition, respondents acknowledge receiving from consumers who successfully completed the program, retainer fees of \$250,472.52, and settlement fees of \$380,512.66. From active clients, respondents received retainer fees of \$399,881.50 and settlement fees of \$410,251.27; and from cancelled clients, retainer fees of \$850,663.85, settlement fees of \$255,954.64, and cancellation fees of \$50,839.96. These sums amount to \$2,934,977.30 from California clients.

8. Respondents argue that the California Check Sellers, Bill Payers and Proraters Law benefits creditors—not debtors. They contend that this law restricts, rather than promotes, debt liquidation. Pointing to the increasing escalation of debt and debt liquidation encountered by our citizens,¹⁵ respondents emphasize the service they render to a population of consumers, underserved by existing debt liquidation entities or, for that matter, the bankruptcy law, has provided substantial financial benefit to such consumers. In the rendering of such services, respondents claim they do not charge excessive fees or enjoy excessive profits.

9. Neither claim is particularly dispositive in addressing the impropriety of their unlicensed business activities. Simply put, there is no legal basis to support either the imposition of fees or the enjoyment of any profits derived from respondents' activities in the absence of a license. Although respondents now submit that they have, as a result of a denied Superior Court stay of the Commissioner's Order, refrained from charging California clients and, accordingly, their current activities in the servicing of extant California clients do not now constitute prorating, it cannot be ignored that California consumers have funds deposited and employed toward debt liquidation. That no fee is currently being charged because of the Commissioner's Order does not vitiate (or mitigate) either past practices or each California client's entitlement or access to his or her funds, and the protections provided by the California Check Sellers, Bill Payers and Proraters Law.

10. Respondents' business operations provided a benefit to indebted California consumers, particularly those seeking an alternative to bankruptcy. In addition, respondents' business operations sought to avoid any injury to clients. Respondents, and their employees, took particular pride in the partial or full liquidation of each client's debt. In the conduct of their prorating activities, respondents nevertheless failed to use appropriate contract forms, failed to direct or provide timely receipts, failed to provide timely accountings to their clients, and imposed charges either not permitted or in excess of limitations set by the California Check Sellers, Bill Payers and Proraters Law.

11. Although respondents claim their violation of the California Check Sellers, Bill Payers and Proraters Law was not perpetrated willfully, it is competently established that their business operations were willfully conducted in an effort to avoid this law's application

¹⁵ See also "Borrowing by U.S. Households", Federal Reserve Bank of Richmond, *Economic Quarterly*, Volume 92/3, Summer 2006, pp. 177 – 194.

or jurisdiction over such operations.¹⁶ Respondents' current effort to claim ambiguity in the provisions of the California Check Sellers, Bill Payers and Proraters Law is inapposite.

12. Prior to the issuance of the Order, respondents engaged in prorating. Upon receipt of the Order, respondents ceased recruiting California consumers but continued to render prorating services to then-extant California clients. Not until the Superior Court of California sustained the Order did respondents cease operations that fell within the ambit of the California Check Sellers, Bill Payers and Proraters Law. Respondents' effort to cite their belated compliance as mitigation of any penalty is hardly meaningful.

Costs Declaration

13. On October 30, 2006, counsel for the Commissioner, Ms. Kerst, submitted a costs declaration attesting to the following incurred fees and expenses, amounting to \$69,935.04:¹⁷

A.	Attorney fees attributed directly to counsel:	\$ 47,689.35 ¹⁸
B.	Financial Services Corporations Examiners:	\$ 16,850.70
	DiAun Burns:	\$ 14,146.875 ¹⁹
	Dale Lucas:	\$ 724.32 ²⁰
	Carol Vecchio:	\$ 1,979.505 ²¹
C.	Litigation expenses (e.g., travel, per diem):	\$ 5,495.00

14. On November 6, 2006, counsel for respondent, Mr. Mallow, submitted a letter relating to Ms. Kerst's costs declaration, soliciting Ms. Kerst for additional information and questioning the propriety of any award for attorney fees, costs or expenses; and, alternatively, addressing the scope of Ms. Kerst's submission. To that end, Mr. Mallow specifically set forth having "no issue with [Ms. Kerst's] time," and observing that "the time

¹⁶ Respondents candidly acknowledge, "Respondents endeavored to avoid the Prorater Law, not as an effort to gouge consumers, but as an effort to serve the public desiring to engage in debt settlement." NAS Respondents' Closing Brief: p. 14:3-4.

¹⁷ Notwithstanding the Commissioner's request, the sums equal \$ 70,035.05.

¹⁸ Ms. Kerst incurred 396.75 hours on the matter. Her billing rate is: \$126.20 (Fiscal Year 2005-2006) and \$128.25 (Fiscal Year 2006-2007).

¹⁹ Ms. Burns, a Certified Public Accountant and the designated agency representative, incurred 156 hours on the matter. Her billing rate is: \$90.54 (Fiscal Year 2005-2006) and \$91.87 (Fiscal Year 2006-2007).

²⁰ Mr. Lucas incurred 8 hours on the matter at an hourly rate of \$90.54 (Fiscal Year 2005-2006) and \$91.87 (Fiscal Year 2006-2007).

²¹ Ms. Vecchio incurred 32.25 hours on the matter at an hourly rate of \$61.38 (Fiscal Year 2005-2006) and \$63.90 (Fiscal Year 2006-2007).

of Mr. Lucas and Ms. Vecchio is too minimal to focus on"; expressed some concern with Ms. Burns' time "as unreasonably high."²²

15. On December 1, 2006, Ms. Kerst submitted a Supplemental Declaration accounting for times "expended during October or November" 2006. She observed, "Department personnel time is archived and retrievable on a monthly basis after the end of each month." In addition, expenses relating to transcripts, court reporter costs, and travel were further set forth. In sum, Ms. Kerst claims (and seeks) the following:

- | | | |
|----|---|----------------------------|
| A. | Attorney fees attributed directly to counsel: | \$ 58,387.15 |
| B. | Financial Services Corporations Examiners: | \$ 16,850.69 |
| | DiAun Burns: | \$ 14,146.87 |
| | Dale Lucas: | \$ 724.32 |
| | Carol Vecchio: | \$ 1,979.50 |
| C. | Litigation expenses (e.g., travel, per diem): | \$ 10,944.58 ²³ |

Respondents submitted no response to the December 1, 2006 Supplemental Declaration.

Administrative Penalties

16. Complainant seeks administrative penalties in the sum of \$1,465,000.

LEGAL CONCLUSIONS

1. Financial Code section 12105, subdivision (b) provides, in pertinent part that the commissioner may on behalf of "the public interest" bring "a claim for ancillary relief, including, but not limited to, a claim for restitution or disgorgement or damages on behalf of the persons injured by the act or practice constituting the subject matter of the action."

The Commissioner specifically seeks administrative penalties, reimbursement of fees and costs, and ancillary relief in the voiding of client agreements, client accountings, and restitution and disgorgement.

While the scope of ancillary relief has been briefed, and the gravity of respondents' actions has been demonstrated, no California reported case exists that provides guidance in the manner in which ancillary relief, penalties, and costs sought by the Corporations Commissioner are to be imposed or assessed.

²² Respondents, prior to conclusion of the evidentiary portion of this phase of the matter, were reserved the right to exercise cross-examination relating to any submitted costs declaration. Respondents did not exercise that right.

²³ Ms. Kerst's cost declaration did not include an amount ascribed to the Office of Administrative Hearings for the conduct of this matter. Court reporter fees in the sum of \$3,709 have however been included.

Each prayer for ancillary relief is separately addressed below.

Respondents summarily contend that no act or practice conducted in the operations of their business activities injured any client. Notwithstanding such claim, it is clear from the evidence that all funds, received by respondents, are derived from clients' monies. Each client is an indebted consumer seeking to vitiate or escape his or her financial indebtedness with creditors. Respondents, by and through their business operations, facilitate debtor relief. In conducting their activities, on behalf of their clients, respondents each failed to obtain a license from the Commissioner.

It was readily and increasingly apparent to the undersigned that respondents were less than forthcoming in providing complainant sufficiently detailed information relating to each California consumer.

For their efforts rendered on behalf of California consumers, respondents acknowledge receiving administrative fees of \$336,400.90. In addition, respondents acknowledge receiving from California consumers who successfully completed the program, retainer fees of \$250,472.52, and settlement fees of \$380,512.66. From active clients, respondents received retainer fees of \$399,881.50 and settlement fees of \$410,251.27; and from cancelled clients, retainer fees of \$850,663.85, settlement fees of \$255,954.64, and cancellation fees of \$50,839.96. These sums amounted to \$2,934,977.30.

A. Restitution, Disgorgement or Damages

Complainant seeks \$2,934,977.30 from respondents as restitution or disgorgement.

Financial Code section 12105, subdivision (b) provides, in pertinent part, "the commissioner may include in any action a claim for ancillary relief, including, but not limited to, a claim for restitution or disgorgement or damages on behalf of the persons injured."

It is clear that respondents' efforts functioned to reduce or eliminate the debts of hundreds of Californians. On the other hand, the unlicensed nature of respondents' activities escaped regulatory oversight and regulatory accounting. Not until the disciplinary phase of this proceeding did respondents tender sufficient information that would permit the Commissioner an opportunity to glean the scope of respondents' activities as it related to California consumers. Unsurprisingly, respondents oppose an order that would compel either restitution or disgorgement or damages for services rendered California consumers.

The purpose of the California Check Sellers, Bill Payers and Proraters Law is, in part, to protect the public against dishonest and incompetent proraters. Proraters are required to possess, inter alia, evidence of financial solvency,²⁴ honesty²⁵ and experience;²⁶ and, unless

²⁴ Financial Code sections 12205, and 12221, subdivision (h).

²⁵ Financial Code section 12221, subdivisions (a) and (b).

otherwise exempt, must be bonded.²⁷ The requirements for licensure when balanced with the range of relief vested in the Commissioner, reflects the significance the Legislature has placed on the deterrence of unlicensed persons or enterprises from engaging in prorating. The policy to be served therefore outweighs any harshness which may be sustained by a party.²⁸ Indeed, it would appear that the import of Financial Code section 12105, subdivision (b)'s reference to "restitution or disgorgement" reflects a Legislative determination that the unlicensed not profit from their activities.

Pitted against respondents' unlicensed prorating activities is evidence that many California consumers were responsibly served. Further, properly incurred operating expenses were incurred by respondents in the conduct of their prorating activities that included payroll, leases, telephone and utilities, and other costs. Respondents' prorating activities involved debtors from across the nation without particular delineation between California clients and non-California clients. While respondents candidly endeavored to structure their activities in a manner that would avoid the Commissioner's regulatory oversight, such endeavor was not undertaken with guile but in an effort to nationally serve a broad market in a responsible and ethical manner.

While ancillary relief may include either "restitution, disgorgement, or damages," the California Check Sellers, Bill Payers and Proraters Law requires a showing of "persons injured by the act or practice constituting the subject matter of the action."²⁹ Many consumers filed complaints with the Better Business Bureau; however, the scope and extent of injury by any discrete California consumer was not competently established.³⁰

On the other hand, the Commissioner has established particularly discrete violations effected by respondents that warrant the remedial relief of Financial Code section 12105, subdivision (b). Specifically, respondents improperly assessed and retained client monies as "cancellation fees."

(1) Cancellation Fees

Financial Code section 12314.1 provides, "A cancellation fee or termination penalty may not be charged to a debtor." Respondents admittedly charged such a fee. Despite respondents' protests, the propriety of such a charge is expressly prohibited. Further, a prohibited charge injures an already disadvantaged debtor by the imposition of an obligation not legally permitted. Accordingly, cause exists to order respondents to pay \$50,839.96 as

²⁶ Financial Code section 12221, subdivision (e).

²⁷ Financial Code section 12205, subdivision (a).

²⁸ See *Scientific Cages, Inc. v. Banks* (1978) 81 Cal. App. 3d 885, 888; *Lewis & Queen v. N.M. Ball Sons* (1957) 48 Cal.2d 141, 151.

²⁹ Financial Code section 12105, subdivision (b).

³⁰ Government Code section 11513.

and for or the imposition of an unlawful cancellation fee pursuant to Financial Codes section 12314.1 and 12105, subdivision (b), and as set forth in Findings 2 through 12.

(2) *Excessive Charges*

Financial Code section 12314 imposes a maximum limitation on what fees a prorater may properly charge. Financial Code section 12316 further mandates that absent “an accidental and bona fide error,” when a prorater charges “in excess of the maximum”, the “prorater’s contract with the debtor shall be void and the prorater shall return to the debtor all charges received from the debtor.”

While respondents submit charges were effected in a good faith belief that the California Check Sellers, Bill Payers and Proraters Law was not applicable to their business activities, that error does not function to mitigate either their culpability or obligations to their clients. On the other hand, respondents’ services are entitled to compensation; but such compensation is limited to the provisions of Financial Code section 12314. While respondents have acknowledged receiving \$2,934,977.30 in funds from California clients, that sum has been reduced, in part, by the cancellation fee prohibition and Order of Restitution previously referenced. Accordingly, \$2,884,137.34 is comprised of administrative fees, retainer fees, or settlement fees charged by respondents as follows:

Cancelled clients:

Retainer fees: \$850,663.85

Settlement fees: \$255,954.64

Closed clients:

Administrative fees: \$336,400.90

Retainer fees: \$250,472.52

Settlement fees: \$380,512.66

Active clients:

Retainer fees: \$399,881.50

Settlement fees: \$410,251.27

Respondents’ imposition of fees or charges in excess of those permitted pursuant to Financial Code section 12314 injured debtors. These consumers’ additional funds could have been used to not only compensate creditors but also more rapidly settle or eliminate each consumer’s debt obligations.

Unfortunately, the evidence submitted fails to categorically establish to what degree respondents have overcharged any particular client. Nevertheless, cause does exist to order respondents to disgorge all overcharges pursuant to Financial Code sections 12314, 12316, and 12105, subdivision (b), and as set forth in Findings 2 through 12.

B. Voiding of client agreements

Financial Code section 12200 prohibits respondents from acting as proraters. Financial Code section 12105 sets forth various remedies and damages against one who violates the provisions of Financial Code section 12200. Complainant seeks the voiding of all client agreements:

Complainant further asserts that respondents' own consumer billing and contract practices violated the limitations imposed by the California Check Sellers, Bill Payers and Proraters Law at Financial Code sections 12314, 12314.1, 12315, 12315.1, 12316, 12319 and 12320, and compel voidance.

Respondents, without an appropriate license or exemption, could not act as proraters for any California consumer. To effectuate their business operations as proraters, respondents fashioned a business platform that involved a series of contracts and documents. "[C]ourts will not lend their aid to the enforcement of an illegal contract or one against public policy."³¹ Indeed, "a party to an illegal contract or an illegal transaction cannot come into a court of law and ask it to carry out the illegal contract or to enforce rights arising out of the illegal transaction. He cannot set up a case in which he necessarily must disclose the illegal contract or the illegal transaction as the basis of his claim."³² Respondents, lacking a required license, contracted with each California consumer for the rendering of prorating services.

Financial Code section 12316 expressly sets forth, in pertinent part, "If a prorater contracts for, receives or makes any charge in excess of the maximum permitted, the prorater's contract with the debtor shall be void and the prorater shall return to the debtor all charges received from the debtor."

Monies expended by respondents' clients for the services rendered, exceeded, in several instances, the limitations imposed by the California Check Sellers, Bill Payers and Proraters Law. Contracts between respondents and their consumers for the rendering of prorating services were unlawful pursuant to Financial Code sections 12316, 12200 and 12105, subdivision (b), and, therefore, unenforceable and subject to voidance as set forth in Findings 2 through 12.

³¹ *Norwood v. Judd* (1949) 93 Cal.App.2d 276, 288-289.

³² *Wise v. Radis* (1925) 74 Cal.App. 765, 775-776.

C. Accounting

Financial Code section 12322 requires, "At least once in each six (6) months, the prorater shall render an accounting to the debtor...." The evidence is clear that respondents were remiss in providing accountings as required by Financial Code section 12322. Indeed, section 12322 further requires, "A prorater shall in addition render such an account to a debtor within seven days after written demand." Respondents also failed to meet such requirements.

Complainant seeks an order compelling such accountings. Mindful that respondents continue to maintain control over client accounts, the mandatory provisions of Financial Code section 12322 compel respondents' compliance.

2. Administrative penalties are distinct from ancillary relief.³³ Financial Code section 12105, subdivision (c) provides for an award of \$2,500 per violation. Complainant expressly seeks an award of \$1,465,000. At \$2500 per violation, this would appear to reflect 586 violations.

Respondents acknowledge rendering services subject to the California Check Sellers, Bill Payers and Proraters Law to no less than 3,078 California consumers.

What has been established is that respondents, with respect to each client (whether 586 or 3,078), violated the following sections:

Financial Code section 12200 – Unlicensed Prorating

Financial Code section 12315.1 – Failure to Timely Notify Creditor

Financial Code section 12319 – Contract Form

And with respect to a smaller group of clients, respondents additionally violated:

Financial Code sections 12314 and 12315 – Exceeded Maximum Fees

Financial Code section 12314.1 – Unlawfully Charging Cancellation Fee.

In addition, complainant prayed that respondents, by virtue of their fee splitting arrangements with various marketers, also violated Financial Code section 12324. This section, at subdivision (a), prohibits a prorater from providing compensation to one who refers prospective customers. At subdivision (b), this section bars the receiving of any compensation from any person other than the debtor for the rendering of prorating services. Respondents made broad use of the Internet and marketers therein. A fee was paid for each

³³ *Lewis & Queen, supra.*

client who remained for a period of time with respondents. Such conduct violated the prohibition of Financial Code section 12324.

Administrative penalties are punitive. Unlike ancillary relief, which seeks to recompense those who have been injured; administrative penalties serve to punish one who has violated statutory or regulatory prohibitions and, by their imposition, function to deter others. Because of their nature, the imposition of administrative penalties requires greater reliance to due process.³⁴ In that respect, our State Legislature has expressly set forth that the imposition of such penalties may only be effected "after appropriate notice and opportunity for hearing."³⁵

A review of the Statement in Support of Order Levying Administrative Penalties³⁶ does not provide the specificity ordinarily associated with an order compelling the payment of an administrative penalty. It is impossible to discern not merely the nexus to the specific 586 violations alleged but, more importantly, which violations are specifically associated with the administrative penalty sought. Admittedly, respondents have violated the California Check Sellers, Bill Payers and Proraters Law in several regards. And while hundreds, indeed thousands of California consumers, have been affected by respondents' failure to obtain Commissioner licensure, a minimum degree of notice must be specifically afforded respondents before the undersigned may properly impose administrative penalties that would support 586 violations.

At paragraph 16 of the Statement in Support of Order Levying Administrative Penalties, complainant alleges, following Financial Code section 12105, subdivision (b)'s reference to administrative penalties, "Respondents engaged in contracts with at least 3,118 consumers that are in violation of the CSBPPL³⁷ and void. According to Respondents' documents, they have obtained fees of at least \$1,000 from each of these clients. Consumers were required to pay a 'set up' fee of \$299, and a 'retainer' fee of at least \$250 per month for three months. If they remained as Respondents' clients, Respondents took 'settlement fees' of at least 25 percent of the amount 'saved' from consumers' funds." At paragraph 17 of the same Statement, complainant further alleges, "In cases where consumers sought to terminate their agreement prior to settlement, usually because Respondents failed to perform the promised services, Respondents then charged consumers an additional \$250 'cancellation' or termination fee."

Finally, in the Commissioner's prayer, the Commissioner expressly sets forth, "The Department seeks an Order levying administrative penalties and costs to Respondents for their CSBPPL violations in the manner described herein: A. On entry of a Decision,

³⁴ *Ralph Williams Ford v. New Car Dealers Policy & Appeals Bd.* (1973) 30 Cal.App.3d 494, 500.

³⁵ Financial Code section 12105, subdivision (b).

³⁶ Complainant's December 21, 2005 filed Statement in Support of the Desist and Refrain Order requested ancillary relief and costs, but not administrative penalties.

³⁷ CSBPPL denotes the California Check Sellers, Bill Payers and Proraters Law.

Respondents shall deliver to counsel for the Commissioner a check for CSBPPL violations in the amount of \$2,500 for each violation, or such amount as this Court may order.”

Respondents cite several cases decided by the Office of Administrative Hearings to support their arguments that administrative penalties should not be imposed. None is dispositive. Respondents then cite an administrative regulation³⁸ pertinent to the Department of Corporations’ matters relating to mitigation considerations in the imposition of penalties. That regulation, by its own terms³⁹ and equally recognized by respondents, is inapposite to this proceeding.

Of import is respondents’ correct observation that the DOC (Department of Corporations) “has failed to articulate any basis for administrative penalties other than to cite the code section that allows for administrative penalties.” Respondents thereupon conclude, “On this ground alone, the DOC’s request should be denied.”⁴⁰

Respondents’ contentions have merit, in part. However, the claim that some notice, however modest, has been afforded respondents has merit.

It is abundantly clear from the notice provided respondents that complainant sought penalties for their violations of the California Check Sellers, Bill Payers and Proraters Law. However, in the fashioning of the pleading for the imposition of administrative penalties, complainant’s notice is, at best, limited to the allegations referenced in paragraphs 15 through 17. These allegations, without reference to all 3,118 consumers, reference the nature of violations effected by respondents. The weight of the evidence sustains a conclusion that each respondent, at a minimum, violated:

Financial Code section 12200 – Unlicensed Prorating

Financial Code section 12319 – Contract Form

Financial Code sections 12314 and 12315 – Exceeded Maximum Fees

Financial Code section 12314.1 – Unlawfully Charging Cancellation Fee.

Lacking further specificity as to 586 violations or the alleged 3,118 customers, pursuant to Financial Code section 12105, subdivision (c), and Findings 2 through 12 and 16, cause exists to impose a \$2,500 administrative penalty against each respondent for each

³⁸ California Code of Regulations, title 10, section 250.70.

³⁹ California Code of Regulations, title 10, section 250.70, subdivision (a), provides, in pertinent part: “In determining the amount of any administrative penalty levied or assessed against any person subject to Part 3, Division 1, title 4 of the Corporations Code for each violation of any statute, rule, or order....” This is a proceeding pursuant to the Financial Code.

⁴⁰ NAS Respondents’ Closing Brief, p. 12:4-6.

violation (Financial Code section 12200, section 12319, sections 12314 and 12315, section 12314.1, and section 12324) is warranted, totaling \$12,500 per respondent.

3. Financial Code section 12105, subdivision (e) provides: "In any action under this division, the commissioner is entitled to receive costs, which in the discretion of the administrative or civil court shall include an amount representing reasonable attorney's fees and any related expenses for services rendered." The Order herein is an "action brought under this division" within the meaning of the statute.

Respondents observe⁴¹ that this matter has involved "two formal hearings, the exchange of thousands of pages of documents, and an investigation that has lasted almost a year." Inasmuch as the Commissioner has prevailed, an award of costs is appropriate under section 12105, subdivision (e). In addition, due to the nature and complexity of the case, the multiple respondents, the hundreds of records, the length and scope of hearing and preparation, including the exchanges between and among the parties, the costs and attorney fees incurred by the Commissioner are reasonable. Accordingly, the amount awarded pursuant to Financial Code section 12105, subdivision (e), and as set forth in Legal Conclusions 1 and 2, and each of them, and Finding Nos. 13 through 15, is \$86,182.42.

ORDER

1. Respondents Nationwide Asset Services, Inc.; Universal Nationwide, LLC; and/or Universal Debt Reduction, LLP, shall jointly and severally:

- A. Pay forthwith to the California Corporations Commissioner the sum of \$50,839.96 as and for restitution of unlawfully charged cancellation fees, pursuant to Legal Conclusion 1.A(1).
 - (1) Respondent(s) Nationwide Asset Services, Inc.; Universal Nationwide, LLC; and/or Universal Debt Reduction, LLP, shall provide to the Commissioner within thirty (30) days of the effective date of this Order, a complete list identifying each eligible California client.⁴²
 - (2) Respondents Nationwide Asset Services, Inc.; Universal Nationwide, LLC; and/or Universal Debt Reduction, LLP, shall provide to the Commissioner within thirty (30) days of the

⁴¹ Closing Brief filed November 14, 2006.

⁴² "Eligible California client" denotes any person who was or is a California resident who both enrolled in any respondent's prorating activities and deposited monies toward such activities.

effective date of this Order all documentation relating to all eligible California clients.⁴³

- (3) For the purpose of effectuating restitution, respondents Nationwide Asset Services, Inc.; Universal Nationwide, LLC; and/or Universal Debt Reduction, LLP, shall direct and authorize the release of all eligible California clients' records at Rocky Mountain Bank & Trust to the Commissioner,⁴⁴ and Global Client Solutions, LLC.⁴⁵

B. Pay forthwith, pursuant to Legal Conclusion 1.A(2), to the California Corporations Commissioner the sum of \$2,884,137.34⁴⁶ as and for restitution;⁴⁷ provided, however, upon written application of respondents submitted to the Commissioner within fifteen (15) days of the effective date of this Order, the order of restitution is stayed upon the following terms and conditions:

- (1) Within 90 days of the effective date of this Order, respondents shall select a Certified Public Accountant, who shall be approved by the Commissioner, to conduct an audit, at respondents' expense, of all respondents' records relating to each eligible California client to determine whether any charges imposed by respondents exceeded the limitations of Financial Code section 12314.
- (2) The Certified Public Accountant shall submit a copy of the audit report to the Commissioner for his/her approval. The audit and audit report shall be completed within 180 days of the effective

⁴³ Should the Commissioner determine that insufficient funds exist to reimburse each eligible California client, restitution may be effected pro rata. Further, should any eligible California client not be located after a due diligent search, such refund due that client shall escheat to the State of California.

⁴⁴ Respondents either directly, or by and through their counsel of record, shall serve a copy of this Order within ten (10) days of its effective date, to the Chief Executive Officer of Rocky Mountain Bank & Trust.

⁴⁵ Respondents either directly, or by and through their counsel of record, shall serve a copy of this Order within ten (10) days of its effective date, to the Chief Executive Officer of Global Client Solutions, LLC.

⁴⁶ Funds deposited up to and prior to the September 28, 2006 hearing date, and returned pursuant to this Order to any eligible California client shall reduce, upon proof of disbursal to such client submitted to the Commissioner, the respondents' \$2,884,137.34 restitution amount. Funds deposited by any eligible California client after the September 28, 2006 hearing date, and subsequently returned to such client, shall not reduce respondents' \$2,884,137.34 restitution amount.

⁴⁷ Respondents shall provide to the Commissioner within thirty (30) days of the effective date of this Order, a complete list of all eligible California clients, all documentation relating to such clients, and shall direct and authorize the release of all such clients' records at Rocky Mountain Bank & Trust, and Global Client Solutions, LLC, to the Commissioner.

date of this Order, unless extended by the Commissioner, or his/her designee, for good cause.

- (3) The sum of \$2,884,137.34 ordered as restitution shall be reduced upon the findings and recommendation of the Certified Public Accountant's audit report, following review and written approval of such audit report by the Commissioner.
 - (4) Within thirty (30) days of the written approval of the audit report by the Commissioner, respondents shall tender to each eligible California client by first class United States mail a check refunding monies in such amounts as determined by the audit report along with a letter setting forth that such refund (whether in full or pro rata) reflects an overcharge improperly imposed pursuant to Financial Code section 12314.
 - (5) All funds not returned to eligible California clients shall escheat to the State of California.
 - (6) No less than 60 days following the disbursement of funds to eligible California clients, and no more than 120 days after such disbursements, Respondents shall, at their expense, employ a Certified Public Accountant,⁴⁸ approved by the Commissioner, who will examine all relevant records, disbursements, and documents, and submit a final audit report to the Commissioner that all funds relating to restitution for overcharges improperly received pursuant to Financial Code section 12314 have been disbursed either to each eligible California client or the State of California.
 - (7) Should respondents violate any of the terms and conditions imposed by this stay, the Commissioner may lift the stay for the tender of \$2,884,137.34 from respondents as and for restitution. Said action shall only occur after the filing of a Petition to Vacate the Stay and a hearing upon due notice.
- C. Notify, pursuant to Legal Conclusion 1.B, within thirty (30) days of the effective date of this Order, each eligible California client that any contract(s) existing by and between such client and any respondent(s) has been declared null and void by Order of the California Corporations Commissioner.

⁴⁸ The Certified Public Accountant, previously selected and vetted, may, if he or she concurs, perform this function.

- (1) Respondent(s) Nationwide Asset Services, Inc.; Universal Nationwide, LLC; and/or Universal Debt Reduction, LLP, shall direct Rocky Mountain Bank & Trust and/or and Global Client Solutions, LLC, to return any funds on deposit to or for each eligible California client.
- (2) Respondent(s) Nationwide Asset Services, Inc.; Universal Nationwide, LLC; and/or Universal Debt Reduction, LLP, shall direct Rocky Mountain Bank & Trust and/or and Global Client Solutions, LLC, to terminate any and all automatic electronic fund transfers authorized by each eligible California client for deposit into Rocky Mountain Bank & Trust.
- (3) Respondent(s) Nationwide Asset Services, Inc.; Universal Nationwide, LLC; and/or Universal Debt Reduction, LLP, following refund disbursement of all client funds and/or termination of any and all electronic fund transfer authorization(s), shall direct Rocky Mountain Bank & Trust and/or and Global Client Solutions, LLC, to close each eligible California client's account.

D. Shall, pursuant to Legal Conclusion 1.C, within thirty (30) days of the effective date of this Order provide an accounting to each eligible California client that itemizes:

- (1) The total amount received on the client's account at Rocky Mountain Bank & Trust and/or and Global Client Solutions, LLC.
- (2) The total amount paid to each creditor,
- (3) The total amount which any creditor agreed to accept as payment in full on any debt owed by the client,
- (4) The amount of charges deducted by any respondent, and
- (5) Any amount held in reserve.

2. Respondent Nationwide Asset Services, Inc., a.k.a. Nationwide Asset Services, shall pay forthwith to the California Corporations Commissioner the sum of \$12,500 as and for administrative penalties pursuant to Legal Conclusion 2.

3. Respondent Universal Nationwide, LLC, dba Universal Debt Reduction, LLP, shall pay forthwith to the California Corporations Commissioner the sum of \$12,500 as and for administrative penalties pursuant to Legal Conclusion 2.

4. Respondents Nationwide Asset Services, Inc.; Universal Nationwide, LLC; and/or Universal Debt Reduction, LLP, shall pay forthwith jointly and severally to the California Corporations Commissioner the sum of \$86,182.42 pursuant to Legal Conclusion 3.

DATED: January 3, 2007

~~JAIME RENÉ ROMAN~~
Administrative Law Judge
Office of Administrative Hearings